IN THE

Supreme Court of the United States

October Term, 1958.

No. 313

CARL REISTLINE,

Petitioner,

vs.

CITY OF SAN DIEGO and GENERAL DYNAMICS CORPORATION,

Respondents.

Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit.

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CITY OF SAN DIEGO and GENERAL DYNAMICS CORPORATION,

Respondents.

Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to review the opinion and decision of the United States Court of Appeals for the Ninth Circuit in the case entitled; Carl Beistline, Appellant *vs.* City of San Diego and General Dynamics Corporation, Appellees.

Opinions of Court Below.

The opinion of the District Court of the United States, Southern District of California, Southern Division (Ap. p. 1) has not been reported; and the opinion of the Court of Appeals (Ap. p. 3) had not reported at the time this petition went to press.

Jurisdiction.

The judgment of the Court of Appeals is dated June 3, 1958, was entered on that date (Ap. p. 3). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Sec. 1254 (1) which provides for review by this Court "By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

Questions Presented.

1. Whether a complaint which alleges that a defendant Municipal Corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under the false and fraudulent representation that such real property was to be used by the Municipal Corporation for a public purpose, states a cause of action of which the District Court of the United States has jurisdiction.

2. Whether a complaint which alleges that a defendant Municipal corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under its representation that such real property was to be used by the Municipal corporation for a public purpose, and has not used such real property for a public purpose, but conveyed it to a defendant corporation for industrial uses, states a cause of action of which the District Court of the United States has jurisdiction.

Constitutional Provisions.

The provisions of the Constitution of the United States of America which are involved in this case are found in Amendment V, which provides: "* * * nor shall private property be taken for public use without just compensation," and in Amendment XIV, which provides: "* * * nor shall any State deprive any person of life, liberty, or property without due process of law."

Statement of Case.

The basis for invoking the jurisdiction of the Court in the first instance is found in 28 U. S. C. Sec. 1331, which provides: "The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Petitioner filed his complaint on May 29, 1957 in two counts against Respondents City of San Diego and General Dynamics Corporation [R. 1]. The first count alleges that plaintiff sold eighty-two acres of land to the defendant City of San Diego as a result of fraudulent representations of the City that it intended to use the lands for a public purpose, namely for the use of a Municipal airport, and as a result of a condemnation suit brought against the plaintiff and others to condemn his and others' land; that the price for said land paid to plaintiff was $62.00 an acre, or a total of $5,184.00; that on the 20th day of July, 1957 the defendant City of San Diego sold substantially all of the real property to the defendant General Dynamics Corporation for the purpose of industrial use at a price of $3100.00 an acre, or a total consideration of approximately $245,000.00, and that plaintiff would not have sold said property to the de-

fendant City had it not been for the said fraudulent representations; and that the defendant General Dynamics Corporation had knowledge of the fraudulent representations.

The second count incorporates substantially all of the foregoing and in addition alleges that the said real property has never been put to a public use. The conveyance was made upon condition that the City of San Diego was to use said property for a public purpose; that the plaintiff has been deprived of his property without due process of law, and that the defendant General Dynamics Corporation had knowledge of the manner and means by which the City has acquired the said property.

The respondent City of San Diego filed its motion to dismiss the complaint upon the grounds that no relief could be granted thereon, and that the jurisdiction of the Court was invoked solely on the grounds that the action arose under the Constitution and laws of the United States, and that it is an inhabitant of the State of California [R. 10]. The respondent General Dynamics Corporation filed its motion to dismiss the complaint upon the ground that it failed to state a claim against the defendant upon which relief could be granted, and on the ground that the Court lacked jurisdiction because the complaint failed to state facts constituting diversity of citizenship or constituting an action arising out of the Constitution or laws of the United States and that jurisdiction of the Court was invoked solely on the ground that the action arises under the Constitution and laws of the United States [R. 11].

On August 14, 1957 the Court granted both motions to dismiss with leave to file an amended complaint within twenty days (Ap. p. 2).

Petitioner filed his notice of appeal with the United States Court of Appeals for the Ninth Circuit [R. 15].

On June 3, 1958 the United States Court of Appeals for the Ninth Circuit affirmed the judgment for lack of jurisdiction (Ap. p. 3).

Reasons for Writ of Certiorari.

There is no enabling statute in California authorizing an action against a Municipal corporation for the fraud of its officers (35 Cal. Jur. 2d 294). In an article in 7 So. Cal. L. Rev. 295, 308 it is stated "in the absence of statute it is safe to state that no tort liability attaches to the municipality for the false representations of its officers * * *." Accordingly, no cause of action may arise for such fraud of one of the United States unless the Constitution of the United States seeks to prevent the taking of private property by a state agency for private use, even if such taking is accomplished by fraud.

That the Constitution of the United States of America does prevent a state from taking a person's property for purposes of speculation is the gist of petitioner's contention. The count containing fraud merely states a clearer case of an unconstitutional act. The constitutional question is not a mere incident to his claim as in *Gully v. First National Bank in Meridian*, 295 U. S. 107, 57 S. Ct. 96, 81 L. Ed. 72.

The holding of the Court is in conflict with *Portland Ry. Light and Power v. City of Portland*, 181 Fed. 632 (D. Ore. Cir.), the Court there saying, page 633, "if the order of the common counsel under its authority to open the streets has deprived or is about to deprive the complainant of its property without due process of law, it is entitled to remedy in this Court * * *," and in

conflict with *Weaver v. Pennsylvania Ohio Power and Light Company*, 10 F. 2d 759, 760 (6th Cir.), the Court saying, page 760, "as the bill charges collusion between the Highway authorities and private interests to use the power of eminent domain in taking plaintiff's land for private purposes without public necessity therefor, the District Court had jurisdiction on elementary principles to entertain a bill for injunction."

The decisions of the Courts below are in conflict with applicable decisions of this Court.

In *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 17 S. Ct. 130, 41 L. Ed. 489 the State of Nebraska through its Board of Transportation had ordered the plaintiff in error to surrender part of its property to private persons for the purpose of building thereon an elevator. The Supreme Court through Mr. Justice Gray held: "the taking by a State of the private property of one person or corporation for the private use of another is not due process of law and is a violation of the Fourteenth Amendment of the Constitution of the United States."

This case has been consistently followed by the Supreme Court of the United States, the latest reported case being *Thompson v. Consolidated Gas Company*, 300 U. S. 55, 57 S. Ct. 364, 81 L. Ed. 510, the Supreme Court by Mr. Justice Brandeis saying (300 U. S. 55, 80), "and this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." In *O'Neill v. Leamer*, 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249, plaintiffs in error filed an action to enjoin defendants in error, a public corporation, from constructing a ditch, alleging that the enterprise was "wholly private." The defendants in error

moved to dismiss upon the ground that no federal question was presented in the record. The Court said, by Mr. Justice Hughes, page 249, "but we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose and hence contrary to the Fourteenth Amendment as amounting to a deprivation of private property without due process of law."

Petitioner submits that where the taking has been accomplished under the fraudulent representation that the use is to be public, but is in fact private, the same federal question is presented. In the one case the wrong is yet to be accomplished. In the other the wrong has been accomplished.

Conclusion.

The ruling of the Court below makes it possible for a State Agency to take the property of a person for speculation, and even when such taking is accomplished by the fraudulent representation that the property is to be put to a public use.

Petitioner urges that such holding puts in jeapordy the right to the enjoyment of property guaranteed by the Constitution of the United States of America.

Respectfully submitted,

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McNULTY & SOUTER, and
LEVENSON, LEVENSON & BLOCK,
Of Counsel.

APPENDIX.

Memorandum of Decision.

In the United States District Court, Southern District of California, Southern Division.

Carl Beistline, Plaintiff, v. City of San Diego, and General Dynamics Corporation, Defendants. No. 2038-SD-C.

Filed Aug. 9, 1957.

In this case, the plaintiff has attempted to base jurisdiction on the ground of a federal question under 28 U.S.C.A. Sec. 1331.

The motion of General Dynamics Corporation to dismiss on the ground of lack of jurisdiction because of the absence of a federal question, is granted. Gully v. First National Bank, 299 U. S. 109.

The motion to dismiss of the City of San Diego, although not artfully drawn, (see Sequoia Union High School v. United States [9 Cir. 6/5/57, slip opinion] raises the issue of lack of jurisdiction because of the absence of a federal question. The motion is granted. Gully case, *supra*.

Counsel for General Dynamics to prepare a written order of dismissal pursuant to the rules of this court.

Order of Dismissal.

In the United States District Court, Southern District of California, Southern Division.

Carl Beistline, Plaintiff, vs. City of San Diego, and General Dynamics Corporation, Defendants. File No. 2038-SD-C.

This cause came on to be heard on the motion of the defendant, General Dynamics Corporation, and defendant, City of San Diego, to dismiss the above-entitled action because of one of jurisdiction over the subject matter, and it appearing to the court that plaintiff's Complaint fails to state facts a) constituting diversity of citizenship, b) constituting an action arising out of the Constitution or laws of the United States of America, or c) constituting any other grounds sufficient to give this court jurisdiction, it is

ORDERED that the motion to dismiss is hereby granted as to both of the above-named defendants and this action is dismissed without prejudice with leave to plaintiff to file an amended Complaint herein within 20 days from the date of this Order, and that defendants, and each of them, recover their costs.

Dated Aug. 14, 1957.

/s/ JAMES M. CARTER
U. S. District Judge

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Carl Beistline, Appellant, vs. City of San Diego and General Dynamics Corporation, Appellees. No. 15-771.

Jun. 3, 1958.

Appeal from the United States District Court for the Southern District of California, Southern Division.

Before: FEE and BARNES, Circuit Judges

BARNES, Circuit Judge:

Plaintiff-appellant sued in 1957 to rescind the sale made by him to the City of San Diego in 1947 of eigthy-two acres of land located on Kearney Mesa in the said City of San Diego, California, or, in the alternative, for an accounting of profits. Plaintiff voluntarily sold the property, but only after the City of San Diego had filed a suit to condemn the property for use as a municipal airport. Nine years later, in 1956, the City of San Diego is alleged to have sold the same land to defendant General Dynamics Corporation at a considerable profit. Plaintiff charges in his first cause of action that the representations made to him by the City of San Diego concerning the intended use of the property "were entirely false and untrue," and that the corporate defendant knew they were untrue; in his second cause of action that the condemnation suit constituted compulsion and duress. Plaintiff sought to base jurisdiction in the United States courts on the presence of a substantial federal question. (28 U.S.C. §1331.)

Each defendant moved to dismiss upon the ground of lack of jurisdiction, *i.e.*, that no substantial federal ques-

tion was involved. Each such motion was granted. Plaintiff was granted leave to amend, but preferred to stand on his complaint, and here presents a timely appeal.

The essence of plaintiff's theory is that a constitutional question exists as to whether a state can deprive a citizen of property without due process of law in violation of section 1 of the fourteenth amendment because of the *taking* of property, *i.e.*, "forcing" the owner to transfer his property to the city, an agency of the state; that appellant acted under compulsion, fraud and duress; that "the central theme of each Count is that the property of plaintiff was *taken* not for a public use, but for a private use . . . * * * . . . that the immunity of plaintiffs property from seizure for private use is an essential element of plaintiff's cause of action."

Plaintiff's theory of recovery thus rests upon several facts assumed to be true: (a) that there was a "taking;" (b) that the transfer of the property was not voluntary; and (c) that the subsequent sale by the City of San Diego proves that the original acquisition was for private use and not for public use as an airport, and hence fraudulent. Each of such assumptions is incorrect.

A "taking" is accomplished by possession under an order for "vesting," Metropolitan Water District of S. Cal. v. Adams, 1940, 16 Cal. 2d 676, 107 P. 2d 618, or by payment of a final judgment in condemnation. "The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property." 23 Tracts of Land v. United States, 6 Cir., 1949, 177 F. 2d 967, 969-70. Appellant chose, by settlement, to avoid and not to force or endure any "taking" of his property. None is alleged, and none could be, under the facts of this case. Thiriot v.

Santa Clara Elementary School District, 1954, 128 Cal. App. 2d 548, 275 P. 2d 833.

The facts pleaded by appellant show the sale by him to the City of San Diego was voluntary, albeit triggered by the filing of the suit to condemn. The filing of suit to condemn is certainly a threat to do an act, but a legal threat, *i.e.*, a "threat" to exercise a sovereign power reserved by and inherent in the state in the interest of all of its people. Rose v. State, 1942, 19 Cal. 2d 713, 123 P. 2d 505. To hold that the filing of a suit to condemn is a threat constituting legal compulsion and duress would prevent and invalidate any compromise of any disputed value by any condemning authority subsequent to the filing of any suit to condemn. No such theory does or could exist in the law of condemnation, especially when it is recognized that a condemnation proceeding is by its very nature a forced or compulsory sale. Hawaiian Gas Products v. C.I.R., 9 Cir., 1942, 126 F. 2d 4, 5, and authority cited therein.

This is not a case presenting the problem raised where land has been dedicated to a public use by conveyance subject to a condition, or impressing a trust. A breach of such a condition or trust may be restrained. Here the transfer of fee simple title was unconditional and voluntary. It was the free choice of appellant, just as is any compromise of any litigant's law suit.

Because a sovereign body plans to acquire private property for a lawful purpose (here an airport), does acquire the property with such purpose, and thereafter changes its corporate mind and uses the property for a different purpose, or even trades or sells the property to another, and at an increased price, does not thereby establish a taking for a private use, nor fraud, nor any fraudulent or

false or untrue representations. Need for taking the particular land, like the issue of compensation for the taking, is judged solely by the conditions existing at the time of the taking. Reichelderfer v. Quinn, 1932, 287 U. S. 315, 323; Spinks v. City of Los Angeles, 220 Cal. 360, 31 P. 2d 193; Arechiga v. Housing Authority of the City of Los Angeles, ... A.C.A....., decided April 24, 1958; 18 Am. Jur., Eminent Domain, §124, p. 768.[1] (*Cf.* Ritzman v. City of Los Angeles, 1940, 38 Cal. App. 2d 470, 101 P. 2d 541.)

Appellant was given the opportunity to amend his pleadings, but refused. He prefers to rely on the meager conclusions he pleads, that the purchase and subsequent sale, according to his best information and belief, constitute fraud. The only facts alleged, *i.e.*, the purchase and the subsequent sale, cannot support a charge of extrinsic fraud.

Here, the language quoted in the Thiriot case, *supra*, is directly in point because of the factual similarity in the two cases. There, the California court said the fraud alleged pertained to one of the main issues in any condemnation suit, the necessity of the taking for a use authorized by law. (Cal. Code Civ. Proc. §1241.) The court then pointed out that the fraud charged must be extrinsic or collateral fraud.[2] No suggestion of extrinsic fraud is here pleaded.

[1] In 18 Am. Jur., Eminent Domain §124, p. 768, the text reads:

"When land has been acquired for the public use in fee simple unconditional, either by the exercise of the power of eminent domain or by purchase, the former owners retain no rights in the land, and the public use may be abandoned or the land may be devoted to a different use without any impairment of the estate acquired or any reversion to the former owners."

[2] "What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the book

But were we to assume that appellant could plead or prove facts which would entitle him to try the issues of fraud and duress, he still would not be entitled to bring his action in the federal court. Every case involving fraud and duress does not involve a constitutional question of due process. A general allegation of a constitutional issue is sufficient, but the claim or fact upon which the constitutional issue is raised must be pleaded, and "well-pleaded." 2 Moore, Fed. Prac. & Proc. §8.09, p. 1630 (2d 1957). The facts here, interpreted most favorably toward appellant, show no deprivation of due process by the City of San Diego in the acquisition of the property.

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are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest.' Pico v. Cohen, 1891, 91 Cal. 129, 133-134, 25 P. 970, 971, 27 P. 537, 13 L.R.A. 336.

This principle and these rules still obtain. 'The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. * * * Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. * * * If an unsuccessful party to an action has been kept in ignorance thereof * * * or has been prevented from fully participating therein * * *, there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. * * * Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court.' Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. * * *' Westphal v. Westphal, 1942, 20 Cal. 2d 393, 397, 126 P. 2d 105, 106." Ehrlich v. Santa Clara Elementary School District, 1954, 128 Cal. App. 2d 548, 550, 275 P. 2d 833, 835.

and call for the application of the rule of Gully v. The First National Bank in Meridian, 1936, 299 U. S. 109, as applied by the court below, and as followed in Rosecrans v. William S. Lozier, Inc., 8 Cir., 1944, 142 F. 2d 118. The latter case says (p. 121), quoting in part from Gully, *supra:*

> "It is not always easy to determine when a suit may be said to arise under the Constitution or laws of the United States. Some tests, however, seem to be well recognized. To bring a case within the removal statute, *a right or immunity created by the Constitution or laws of the United States must be the essential element of plaintiff's cause of action. Gully vs. First National Bank, supra.* It is not sufficient to warrant removal that in the progress of the trial it *may* be necessary to give a construction to the Constitution or laws of the United States, but the case must substantially involve a dispute or controversy as to the effect or construction of the Constitution, laws or treaties of the United States, upon the determination of which the result depends. *The controversy must be genuine and present as distinguished from a possible or conjectural one.*" [Emphasis added.]

If the plaintiff can plead and prove a good case of fraud and duress, his remedy lies, as it does with any other litigant, in the state court.

We affirm the judgment below for lack of jurisdiction.

(Endorsed:) Opinion. Filed Jun. 3, 1958.

As amended by order
of June 16, 1958.

PAUL P. O'BRIEN, Clerk.

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NO. 313

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JAMES R. BROWNING, Clerk

In The Supreme Court of The United States

OCTOBER TERM, 1958

CARL BEISTLINE,

Petitioner,

vs.

CITY OF SAN DIEGO AND
GENERAL DYNAMICS CORPORATION,

Respondents.

BRIEF OF RESPONDENTS GENERAL DYNAMICS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. 313

CARL BEISTLINE,

Petitioner,

vs.

CITY OF SAN DIEGO AND
GENERAL DYNAMICS CORPORATION,

Respondents.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents pray that the petition for a Writ of Certiorari to review the decision of the U. S. Court of Appeals for the 9th Circuit, entitled Carl Beistline, Appellate, vs. City of San Diego and General Dynamic Corporation, Appellees, be denied.

I

INTRODUCTION

A. Opinions of the Court Below

The opinion of the Court of Appeals has been reported at 256 F. 2d 421.

B. Statement of the Case

The case is correctly stated in the petition.

II

THE FIRST QUESTION IN THE PETITION MUST BE ANSWERED NO

The first question presented by the petition for certiorari is stated as follows:

> "Whether a complaint which alleges that a defendant Municipal Corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under the false and fraudulent representation that such real property was to be used by the Municipal Corporation for a public purpose, states a cause of action of which the District Court of the United States has jurisdiction."

Whether a violation of the constitution has taken place is entirely immaterial to a correct decision of the case at bar. Therefore, this case is not one which "arises under the constitution, laws or treaties of the United States" as required by law. Title 28 U.S.C. Section 1331. Accordingly, the District Court is without jurisdiction to hear this case.

The petitioner entered into a settlement agreement with the City of San Diego in 1947, wherein he agreed to convey the property which is the subject of this suit. The petitioner is bound by this agreement unless for some reason it is invalid. Reasons alleged in the complaint are fraud, and duress. If these grounds are substantiated, and barring other valid objections, the petitioner would appear to be entitled to the return of his property and to damages.

If these grounds are not substantiated, petitioner is entitled to nothing. This is true even though it be assumed that the original condemnation action was to obtain property for a private or unconstitutional purpose. The subsequent agreement foreclosed all objections which might be raised in the original suit.

The theories stated by the appellant are based on the purely common law actions of fraud and duress. It is also stated that the City violated an implied condition that the property be used for a public purpose. Obviously, no authority need be cited for the proposition that proof of a violation of the Fourteenth Amendment is not essential for recovery to these actions. Instead it is clear that the question determinative of recovery under each cause is the effect of the City's actions upon the freedom of choice of plaintiff.

It is stated first that the plaintiff decided to convey the land to the City because of representations that the land would be used for airport purposes when in fact the City wanted the property for a private investment, and secondly, that the plaintiff sold the property to the City solely because of a threat of a condemnation suit. It is alleged that in doing the above acts, the City violated the Fourteenth Amendment. This is entirely immaterial. Of what possible importance can it be to recovery under the above mentioned common law theories that the City incidentally violated the United States Constitution. Why should the court be required to decide an issue which is unimportant to granting the relief prayed for?

The law applicable to this case has been well settled ever since the decision of the U.S. Supreme Court in Gully vs. The First National Bank in Meridian, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. ed. 72 (1936). The excellent discussion by Mr. Justice Cardozo of the principles and authorities involved bears quoting at length.

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Citing cases) The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

> "(Citing cases) A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (Citing cases) Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (Citing cases)". (Emphasis supplied)

The rule in the Gully case, supra, has been followed in a great number of later cases. Rosecrans vs. William Lozier Inc., 142 F. 2d 118, (8th Cir., 1944); Teague vs. Brotherhood of Locomotive Firemen and Enginemen, 127 F. 2d 53 (6th Cir., 1942).

The foregoing leaves no doubt that a Federal question is presented for jurisdictional purposes only when its decision is essential for granting or denying the relief prayed for. Jurisdiction is present only when an interpretation of the Constitution in one matter would grant relief and in another would deny it. Since it is essential for the petitioner to rely upon the above mentioned common law theories for recovery in this case, the question of a constitutional violation is immaterial.

III

THE SECOND QUESTION POSED IN THE PETITION MUST BE ANSWERED NO

The petitioner poses the following as a second question presented for decision by the court.

> "Whether a complaint which alleges that a defendant Municipal corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under its representation that such real property was to be used by the Municipal corporation for a public purpose, and has not used such real property for a public purpose, but conveyed it to a defendant corporation for industrial uses, states a cause of action of which the District Court of the United States has jurisdiction."

A. Petitioner Has Failed, as a Matter of Law, to Allege a Violation of the Constitution

It is apparent from reading the petition for certiorari including the above question that petitioner's contention as to the existence of a constitutional violation is grounded solely on the theory that there was an unlawful taking pursuant to the power of eminent domain. This statement is contained in the petition:

> "That the Constitution of the United States of America does prevent a State from taking a person's property for purposes of speculation is the

"gist of petitioner's contention "

It is equally apparent that any conduct which falls short of constituting an exercise of the power of eminent domain does not violate the constitution but at most will give rise to a civil remedy. Therefore, the question here is whether there was a "taking" of appellant's property.

This taking or exercise of power must appear in the complaint from well-pleaded facts. 2 Moore 2d Ed., 1630. The appellant merely alleges that negotiations took place between himself and city officials as to the sale of his property, and that a complaint for condemnation was subsequently filed in Superior Court. No other facts are alleged. It is well settled, both in California and elsewhere, that the foregoing acts by city officials do not amount to a taking of property. Eckhoff vs. Forest Preservation District, 36 N. E. 2d 245, 248, 377 Ill. 208 (1941); 23 Tracts of Land vs. U. S., 177 F. 2d 967 969-970 (6th Cir.., 1949); Hempstead Warehouse Corp. vs. U. S., 98 F. Supp. 572 (Ct. of Cls., 1941); 35 C. J. S. 930).

In the Eckhoff case, supra, the issue before the Supreme Court of Illinois was whether a question of the construction of certain constitutional provisions, including the Fourteenth Amendment to the United States Constitution, was before the court. The question was raised by a motion to strike the pleading. The court said:

> "It seems obvious that the taking or damaging of land by eminent domain is not accomplished by passing resolutions or ordinances, nor by

> "negotiating with the owner for the purchase of it, or serving notices upon him that the land may be required for public purpose.... Entering into negotiations for the purchase, and filing of a petition to condemn, vests no interest in land. (Citing cases)." (Emphasis supplied).

In 23 Tracts of Land, supra, the Sixth Circuit Court of Appeals made this statement:

> "The filing of a petition in condemnation without taking possession is not a taking. The condemnor may discontinue or abandon his effort."

In the Hempstead Warehouse case, supra, it was admitted by the plaintiff that the threat to condemn one's property does not constitute a taking of the property.

> "Plaintiff admits that the threat to condemn one's property does not constitute a taking, as well it must; . . . . ."

Under California law where an order of immediate possession is made before trial, a "taking" does not occur until the date of possession by the condemning authority. Metropolitan Water District vs. Adams, 107 P. 2d 618, 16 Cal. 2d 676 (1940); City of San Rafael vs. Wood, 301 P. 2d 421, 144 Cal. App. 604 (1956); People vs. Peninsula Title Guar. Co., 301 P. 2d 1, 47 Cal. 2d 29, (1956); 17 Cal. Jur. 2d 637; Em. Dom. Section 63.

The foregoing cases were correctly applied by the Court below in holding that there had been no taking in this case.

"A "taking" is accomplished by possession under an order for "vesting," Metropolitan Water District of So. Cal. v. Adams, 1940, 16 Cal. 2d 676, 107 P. 2d 618 or by payment of a final judgment in condemnation. 'The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property.' 23 Tracts of Land v. United States, 6 Cir., 1949, 177 F. 2d 967, 969-70. Appellant chose, by settlement, to avoid and not to force or endure any "taking" of his property. None is alleged, and none could be, under the facts of this case. Thiriot v. Santa Clara Elementary School District, 1954, 128 Cal. App. 2d 548, 275 P. 2d 833."

Certainly the above authorities reflect a fortiori that negotiations together with filing of the complaint in condemnation do not amount to a taking of the property under the power of eminent domain. Without the allegation of proof of an actual "taking", the matter of public or private use becomes immaterial, other than as related to actionable misrepresentations. The latter, of course, pertains only to a common law action of fraud. It is clear, therefore, that no violation of the Fourteenth Amendment has been alleged.

B. Property Acquired Pursuant to the Power of Eminent Domain May Be Put to a Private Use at a Later Time.

This question apparently assumes that no showing of a fraudulent intent as of the time of the sale to the City will be made. Instead, the question is whether the City, after obtaining the property, may thereafter fail

to use it for the intended purpose, and sell the property to a private concern without violating the constitutional rights of the petitioner. The answer to this question was succinctly stated in the opinion of the court below.

> "Because a soverign body plans to acquire private property for a lawful purpose (here an airport), does acquire the property with such purpose, and thereafter changes its corporate mind and uses the property for a different purpose, or even trades or sells the property to another, and at an increased price, does not thereby establish a taking for a private use, nor fraud, nor any fraudulent or false or untrue representations. Need for taking the particular land, like the issue of compensation for the taking, is judged solely by the conditions existing at the time of the taking. Reichelderfer v. Quinn, 1932, 287 U.S. 315, 323; Spinks v. City of Los Angeles, 220 Cal. 360, 31 P. 2d 193; Arechiga v. Housing Authority of the City of Los Angeles, ___A.C.A.___, decided April 24, 1958; 18 Am. Jur., Eminent Domain § 124, p. 768. (Cf. Ritzman v. City of Los Angeles, 1940, 38 Cal. App. 2d 470, 101 P. 2d 541.)"

IV

IF CONDEMNATION PROCEEDINGS HAD BEEN COMPLETED THE PETITIONER WOULD NOT BE ENTITLED TO RELIEF

As stated above, in 1947 the City of San Diego commenced a condemnation suit to obtain certain property, including the petitioner's, for the purpose of operating a municipal airport. The petitioner was named as a defendant in the suit, and accordingly had the opportunity to put in issue and litigate various questions, including the question of whether his property was to be taken for a public use. He chose not to do this, however, and after negotiations with City officials he settled his case out of court. As a part of this settlement, he voluntarily deeded his property to the City.

Since then, the property formerly owned by the petitioner has been sold to the respondent General Dynamics Corporation for a higher price than was originally paid in the settlement. Petitioner then commenced this action, alleging that his property had been obtained from him through fraud.

Under California law, it is clear that the present action, based upon false representations, is barred. An appellate decision has held under facts identical to those with the case at bar except that condemnation proceedings had been completed, that the former landowner was not entitled to relief, and, therefore, that a general demurrer had properly been sustained. This case is most interesting in view of the statement of the petitioner appearing in his opening brief filed in the

Circuit Court of Appeals:

> "In short, plaintiff contends that for the question with which we are here concerned there is no substantial distinction between the situation presented here and the case where the condemnation proceedings are completed and the value of the property taken is fixed by a jury. In both cases the property has been taken under compulsion of law." (Emphasis supplied).

In the case of Thiriot vs. Santa Clara Elementary School District, 275 P. 2d 833, 128 Cal. App. 2d 548 (1954), a school district had commenced an action of condemnation After the answer was filed, the case was settled with the landowner consenting to a judgment. In the later action as in the case at bar, the former landowner as plaintiff alleged that at the time of the earlier suit, the district and its officers had falsely represented that the land was to be used for school purposes and that he had settled the case on reliance upon these representations. The appellate court in ruling that the general demurrer had properly been sustained held that the fraud alleged was intrinsic, and, therefore, the judgment was not subject to attack. The court said:

> "Obviously, the alleged fraud pertained to one of the main issues in the condemnation suit. The applicable statute declares that before property may be taken in eminent domain 'it must appear: 1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use . . . ' (Code Civ. Proc., Sec. 1241).

"The basic principle is that 'there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest.' Pico vs. Cohn (1891), 91 Cal. 129, 133-4, (25 P. 970, 27 P. 537, 25 Am. St. Rep. 159, 13 L.R.A. 336).)" (128 C. A. 2d at pages 549-50).

The case is also significant since it was not even contended that the conduct of the school district had violated the due process clause of Federal or State Constitutions.

V

AUTHORITIES CITED BY THE PETITIONER HAVE NO BEARING ON THE CASE AT BAR

The cases cited in the petition as being in conflict with the opinion of the court below are not applicable to the case at bar. The rule in each case assumes that a taking has occurred or is threatened. Each case asks for injunctive relief. Therefore, for these rules to be applicable to the case at bar, there must have been a taking, as clearly shown in part III, A of this brief, there has not been such a taking.

Furthermore, the case at bar, unlike the cited cases, can succeed only upon a showing of fraud or duress. Reference made to the discussion in part II of this brief. Without such a showing the sale of the property to the City would be valid and binding on the petitioner, regardless of any constitutional violation. Such violation if any occurred is entirely immaterial to recovery under such common law theories.

VI

CONCLUSION

From the foregoing argument and citation of authority, it must be concluded that the District Court has no jurisdiction to hear this case. The complaint does not allege facts constituting a violation of the Fourteenth Amendment. Even if it be assumed that such a violation is alleged, decision of such a question is entirely unnecessary to granting the relief prayed for.

It is therefore respectfully submitted that this Court must affirm the decision of the District Court and the Ninth Circuit Court of Appeals.

Dated September 25, 1857.

Respectfully submitted

LUCE, FORWARD,
KUNZEL AND SCRIPPS

By FRED KUNZEL

The Respondent, The City of San Diego, joins in the foregoing brief.

Dated September 25, 1958.

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